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Death of a Convention: competition between the Council of Europe and European Union in the regulation of broadcasting

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Abstract

This article considers a dispute between the European Union and Council of Europe regarding their respective roles in the broadcasting field, so as to explain and assess its relevance for the development at the international level of media law and policy. The dispute is a long-running one and dates back to the adoption of the first EEC Directive and Council Convention on this subject in 1989. It is argued that the expansion of the scope of EU broadcasting law and the consolidation of the European Commission's role in external affairs left little room for the Council to continue to exercise influence over the regulation of the electronic media in the way it has done for some time. The exact nature of the dispute between the institutions, and the response of a vocal member state, is ascertained through consideration of published minutes and internal correspondence, set in the context of doctrinal and political developments. The article concludes with analysis of possible future actions for the Council.

Keywords

broadcasting, European Union, Council of Europe, Audiovisual Media Services Directive, external relations, internal market

Death of a Convention: competition between the Council of Europe and European Union in the regulation of broadcasting

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1. Introduction[§]

As a result of a legal dispute between the Council of Europe and the European Commission ['the Commission'], a proposed revision of the Council's principal instrument on broadcasting, the European Convention on Transfrontier Television¹ ['the Convention'], has not been adopted. The Commission itself proposed a revision of European Union (EU) broadcasting law in 2005, which was adopted in 2007 as the Audiovisual Media Services Directive² ['the Directive']. The revision of the Directive prompted the Council to put forward its own proposals, as the Convention and Directive have operated in parallel since 1989.

This article is an exploration of (a) the reasons why, over time, the EU and the Council of Europe have disagreed over their respective roles relating to the regulation of broadcasting, and (b) the implications of the possible 'death' of the Convention on the Council's future role in developing media law and policy. It is based on a comprehensive review of Council of Europe documents on the revision process, supported by consideration of the development of the external powers of the European Union and reference to internal discussions within the UK government. The consequences of the outcome for the affected parties are considered.

The EU of today is different to the European Economic Community ['EEC'] of the 1980s in many ways. Its external powers have been clarified in ECJ decisions (and codified through the Lisbon Treaty) and its role in broadcasting has become well settled. The relationship between the Council and the EU is also in transition, as the EU '(moves) into areas already covered by the Council'.³ Nonetheless, the decisions taken regarding the Convention should not pass without comment. As compared with the debate of the 1980s discussed in section 2 (below), where the case for the Council and EEC involvement in the field was made at summit-level meetings and in a thorough

[§] The author thanks academic colleagues for constructive comments on drafts of this article, particularly Claudina Richards (East Anglia), Dr. Ewa Komorek (Trinity College Dublin), Stephanie Berry (Sussex), Prof. Lorna Woods (City), Prof. Steve Peers (Essex) and Dr. Rachael Craufurd Smith (Edinburgh), and acknowledges a very helpful exchange with Ross Biggam of the Association of Commercial Television in Europe. Presented as a paper at the Society of Legal Scholars (2011) and the Institute for the Study of European Laws (2012).

¹ European Treaty Series ['ETS'] 132 (1989).

² Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L263/15.

³ Florence Benoit-Rohmer and Heinrich Klebes, *Council of Europe law: towards a pan-European legal area* (Council of Europe Publishing 2005) 128. Issues here include not just the geographical reach of the Union but also the accession of the Union to the ECHR and the sidelining of the 'pillars' found in earlier Treaties.

fashion in law journals,⁴ there has been virtually no attention paid to the current realignment. What Chalaby described as ‘two European institutions compet(ing) for the opportunity to provide the legal framework for satellite television’⁵ can also be read as a positive approach where the more powerful EU is influenced by the wider but less powerful Council – a process which I refer to as beneficial deliberative competition.

The adoption of the original instruments in 1989 is the subject of section 2. Section 3 explains how, in the period 2005-2011, the Directive was successfully revised but the Convention was not, mapping out the positions of key interested parties and the nature of the disputes between them. Section 4 considers how the Union found itself in such a strong legal position, compares the position of broadcasting with other areas of potential dispute between the Union and Council, and applies a framework for understanding interinstitutional relations developed by Malte Brosig. In section 5, the response of the United Kingdom to the revision of the Convention is considered, making use of documents obtained by the author under the Freedom of Information Act; this allows the reader to understand the dispute as one which had tactical and substantive aspects as well as being about competences. Finally, section 6 considers the future role of the Council of Europe, particularly the proposal for a separate Council instrument on other areas of media law and policy.

2. European institutions and media law

The Council of Europe’s role in relation to the media has evolved over a long period.⁶ It considered issues of copyright and of culture in its earlier years, as well as specific issues of media policy, such as the right of reply (1974) and journalistic freedom (1975). By 1976 a committee of experts on the mass media had been established, later to become the Steering Committee on the Mass Media (CDMM), part of the directorate-general on human rights. As the Europeanisation of broadcasting continued in the 1980s, the CDMM made various recommendations on topics such as advertising (R84-3) and satellite communications (R84-22). More broadly, as Komorek has argued, the development of Council of Europe media policy has been a two-step process. First, the European Court of Human Rights went beyond the strict application of the European Convention on Human Rights (ECHR) to become a policy actor itself, and then the Council of Europe ‘fill(ed) in the gap’ in the Court’s media pluralism jurisprudence.⁷ As such, the Council was, and continues to be, well placed to draft binding legal instruments, based on a long-standing policy agenda.

⁴ Frits Hondius, ‘Regulating transfrontier television: the Strasbourg option’ (1988) 8 YB Eur L 141; Ivo Schwartz, ‘Broadcasting and the EEC Treaty’ (1986) 11 EL Rev 7.

⁵ Jean Chalaby, *Transnational television in Europe* (IB Tauris 2009) 59.

⁶ This summary is adapted from Kayhan Karaca, *Guarding the watchdog - Council of Europe and the media* (Council of Europe Publishing 2003).

⁷ Ewa Komorek, ‘Is media pluralism a human right? The European Court of Human Rights, the Council of Europe and the issue of media pluralism’ [2009] 3 Eur Human Rights L Rev 395, 396, 408.

However, broadcasting was also an issue for the EEC in the 1980s, discussed frequently and at length. In particular, the Commission drafted a Directive on broadcasting during the 1980s, although the process can be traced further back, to the decisions of the ECJ in *Sacchi* and *Debauve*.⁸ The list of proposed single market directives (for action following the 1986 Single European Act towards the 1992 target) drawn up by DG III (then responsible for industry and the single market) included broadcasting as a service, although other directorates-general had an interest in the matter, such as DG IV (on anti-competitive practices) and DG X (culture: on the impact of the import of American programmes).⁹ The division of responsibility (or interest) across directorates-general was to be a regular issue for the development of the EU's approach to the media.¹⁰ The definitive statement of the Commission's early approach is found in the 1983 interim report¹¹ and the following year's Green Paper.¹² These documents sparked a vigorous debate on the form and appropriateness of how law – whether EEC, international, or both – would govern broadcasting.

In particular, it has been argued that the UK and other states, recognising the Council of Europe's interest in media from a cultural and freedom of expression point of view, 'decided to use the Council' to draw up an alternative instrument that was less of an interference with the activities of states than what the Commission was proposing.¹³ The EBU, representing public service broadcasters, was also active on this matter.¹⁴ The proposal was brought forward at the Vienna Council of Europe Mass Media conference of 1986, which called for 'binding legal instruments' to be drafted.¹⁵ This was

⁸ Case 155/73 *Sacchi* [1974] ECR 409 (the nature of a TV signal is that it is the provision of a service); Case 52/79 *Procureur du roi v Debauve* [1980] ECR 833 (member states are limited in the restrictions they can place on broadcasts from other states, but this remains possible when certain conditions are satisfied as there has been no harmonisation). See also Perry Keller, *European and International Media Law* (OUP 2011) 118-9.

⁹ John Howkins & Michael Foster, *Television in 1992: a guide to Europe's new TV, film and video business* (Coopers & Lybrand 1989) 5; Richard Collins, *Audiovisual and broadcasting policy in the European Community* (University of North London Press 1993) 7 (adding DG XIII, telecommunications).

¹⁰ See for example Alison Harcourt, *The European Union and the regulation of media markets* (Manchester University Press 2005) 71-3; David Levy, *Europe's digital revolution: broadcasting regulation, the EU and the nation state* (Routledge 1999) 41 (on the division between 'deregulatory' and 'dirigiste' approaches mapping to DGs), 51-58 (on the proposed media ownership directive).

¹¹ European Commission, 'Realities and tendencies in European television: perspectives and options' COM(83) 229.

¹² European Commission, 'Television without frontiers', COM(84) 300.

¹³ Howkins & Foster (n 9) 57. See also Eva Goerens, 'Interplay between relevant European legal instruments' in Susanne Nikoltchev (ed), *Audiovisual Media Services without frontiers - implementing the rules* (European Audiovisual Observatory 2006) 2 (on the negative attitude to the Commission's proposals bringing 'new stimulus' to Council of Europe work on the media at the Vienna conference); Daniel Krebber, *Europeanisation of regulatory television policy* (Nomos Verlagsgesellschaft 2002) 92 (on the objections from state-level governments and broadcasters in Germany, based on public service broadcasting and on common interest with German-language broadcasters outside the EEC in Austria and Switzerland).

¹⁴ Rosemary Hughes, 'Satellite broadcasting: the regulatory issues in Europe' in Ralph Negrine (ed), *Satellite broadcasting: the politics and implications of the new media* (Routledge, 1988) 68.

¹⁵ Hondius (n 4) 155.

not without obstacle, and in the earlier part of the decade, difficulties in establishing a common approach to media policy between western European states and some in the East were apparent.¹⁶ To some extent, the resulting Convention was designed to resist a 'purely market approach' (which seems to implicate the EEC as favouring such), leading to a lowering of standards, the erosion of the public service concept and damage to European cultural heritage.¹⁷ However, it has also been linked, by the Council of Europe itself, to the broader role of international law in the regulation of cross-border media and the culmination of the Council's 'full programme devoted to the media' from 1976 onwards.¹⁸

So what of the then-EEC? On the one hand, the Commission argued that a services approach did not differ all that much from a human rights one: 'the freedom to provide services within the Community, as manifested in the shape of the freedom of broadcasting, has at least the same scope as the fundamental European right to a free flow of opinions, information and ideas'.¹⁹ Voices within the Union, particularly the Parliament, presented broadcast regulation 'largely in terms of the EU's cultural and political goals'.²⁰ The Commission itself tried to resist the move to dealing with broadcasting through the Council of Europe, even threatening (through Lord Cockfield, then-Commissioner for and 'architect' of the single market) to take action against the UK for violating article 5 of the Treaty of Rome through its promotion of a Convention.²¹

This confrontational approach was eventually to be taken in respect of air transport issues at the turn of the century.²² In the case of broadcasting, the 1989 dispute was resolved (without the formal conflict of the 2009-11 revision, discussed below), with it being agreed that the Convention would be concluded first, followed shortly by the EEC's Directive using generally similar language.²³ The legal basis for the Directive included the freedoms of establishment and to provide services – but not culture, which was not considered (in a limited fashion and with little impact on subsequent

¹⁶ Krebber (n 13) 83.

¹⁷ Explanatory report to European Convention on Transfrontier Television, ETS 132, 25.

¹⁸ Hondius (n 4) 149.

¹⁹ Ivo Schwartz, 'Freedom to provide broadcasting services: legal aspects of trans-frontier broadcasting' in *Broadcasting Policies in the EEC* (European Institute for the Media 1985) 55. The author was a director with responsibility for the approximation of laws regarding freedom of establishment and to provide services with the European Commission and one of the authors of the 1984 Green Paper on the EEC and broadcasting; he also wrote the magisterial 'Broadcasting and the EEC Treaty' (n 4), which considers EU competence in a thorough article-by-article fashion; it is only marred by its complete sidelining of the Council of Europe, which is mentioned once in passing and in a different context than one might expect.

²⁰ Levy (n 10) 41. Cultural goals in this case pertained to Community rather than national culture: Rachael Craufurd Smith, 'Community intervention in the cultural field: continuity or change' in Rachael Craufurd Smith (ed), *Culture and European Union law* (OUP 2004) 41.

²¹ Howkins & Foster (n 4) 57. Presumably referring to the requirement for states to 'facilitate the achievement of the Community's aims' and 'abstain from any measures likely to jeopardise the attainment of the objectives of this Treaty'.

²² Case C-466/98 *Commission v UK* [2002] ECR I-9427 ('Open Skies').

²³ On these events (at the second Ministerial conference in Stockholm, 1988, and the European Council summit in Rhodes, later in 1988, where decisions were reached to proceed with two instruments), see Hondius (n 4) 157-9; Klebber (n 13) 106-7.

legislation) until the Maastricht Treaty of 1992.²⁴ Despite an argument that the debate on the original claim of competence was superficial,²⁵ it is not today the subject of much debate.

Although the Convention dealt with more topics than the Directive (such as fairness in news), the Directive was – as an instrument of EEC law – the more powerful one. It also dealt with a small number of significant matters not covered by the Convention, such as a quota for independent production. Regarding the relationship between the two instruments, the Convention provides in article 27(1) that ‘parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned.’ This ‘disconnection clause’²⁶ means that, for member states of the EU, the purpose of the Convention is to govern relations between the state in question and any non-EU states, which have ratified it. This became a standard form clause,²⁷ albeit criticised for harming the interests of non-EU parties.²⁸ In turn, the Directive contained a recital referring to the Convention.²⁹

Consideration of human rights also informed the debate that led to the 1989 instruments. For example, article 7 of the Convention, dealing with indecency, was designed to reflect both article 10(2) ECHR and the provisions of the Universal Declaration on Human Rights regarding dignity and equality (contained in its preamble), and to be read in the light of ECHR jurisprudence, i.e. *Handyside* and subsequent cases.³⁰ The provisions of the Directive regarding public morality, while influenced by the ECHR, were a new development for EEC law, but the Directive would not have been agreed without them, given the views of member states.³¹ Karaca further proposes that ‘while the [ECHR] defends freedom of information against violations, the [1982 Council declaration on the freedom of expression and information³²]

²⁴ On the significance of this for the drafting of the 1989 Directive, see Levy (n 10) 162-3. On impact, see Craufurd Smith (n 20) 58.

²⁵ Vincenzo Salvatore, ‘Quotas on TV programmes and EEC law’ (1992) 29 CML Rev 967, 968.

²⁶ Jan Klabbers, *Treaty conflict and the European Union* (CUP 2009) 220-1 (noting that clauses of this nature in Council of Europe instruments date from 1988 onwards and that the Commission has defended their use on the grounds that they maintain the primacy and integrity of EU law).

²⁷ Marise Cremona, ‘Defending the Community interest: the duties of co-operation and compliance’ in Marise Cremona & Bruno de Witte (eds), *European Union foreign relations law: constitutional fundamentals* (Hart 2008) 142; Marise Cremona, ‘Disconnection clauses in EU law and practice’ in Christophe Hillion & Panos Koutrakos, *Mixed agreements revisited* (Hart 2010) 168-170.

²⁸ Peter Olson, ‘Mixity from the outside: the perspective of a treaty partner’ in Christophe Hillion & Panos Koutrakos, *Mixed agreements revisited* (Hart 2010) 337 (arguing that they reduce legal certainty and are more disruptive than the normal principles of treaty law and even declarations of competence).

²⁹ Recital 3: ‘The Council of Europe has adopted the European Convention on Transfrontier Television’ (now recital 4 in the consolidated 2010 directive).

³⁰ Explanatory report (n 17) 117-120.

³¹ Howkins & Foster (n 9) 9.

³² Decl-29.04.82E, 29 April 1982.

(went) on the offensive and propose(d) ways of developing it'.³³

As such, the implications of article 10 ECHR for broadcast regulation, particularly when it is 'positive' regulation, continued to be debated. It was argued prior to the conclusion of the Directive and Convention that restricting the nature and quality of content or requiring impartiality or balance cannot be justified by general interest because they are not included within the permissible exceptions under article 10(2) ECHR.³⁴ It is said that article 10 should be read as opposing discrimination against broadcasters from outside a given state,³⁵ but others see the potential for a positive obligation regarding pluralism.³⁶ The ECtHR's decisions in *Informationsverein Lentia*³⁷ (where a refusal to license was found to violate article 10) and particularly *Demuth*³⁸ (where it was not) confirmed the role of the state in guaranteeing media pluralism (including through rules on concentration) and the entitlement of the public to receive a range of information and ideas. Regulation must be prescribed by law and be proportionate but it is not limited to the legitimate aims enumerated in article 10(2).

Looking back at the events leading to the 1989 instruments, it is clear that issues such as the disconnection clause, the role of human rights, and the future relationship between the documents were all left without a complete resolution. However, the very fact that two documents were possible, and aspects of the Council's agenda stayed on the table, demonstrates that beneficial deliberative competition was in operation, but would be tested in the years ahead. I now turn to the implications of amendments to the Directive for the Convention.

3. From revision to refusal?

Despite the complex relationship between the drafting of the Directive and the Convention, subsequent revisions of the Convention have come in response to changes to the Directive. This supports a reading of the Directive as the key instrument, or in Krebbers' alternative framing of the issue, a shift in the status of the Convention from an *alternative* space to an *additional* space.³⁹ The first amending protocol to the Convention (1998) reflected 1997 amendments to the Directive. The Audiovisual Media Services Directive, the second series of amendments to the original Directive, extended the application of aspects of EU broadcasting law to certain on-demand services, while also revising various provisions affecting 'linear' television services.⁴⁰ It

³³ Karaca (n 6) 15.

³⁴ Schwartz (n 4) 58-9.

³⁵ Martin Seidel, 'Europe and the media' (1985) 22 CML Rev 129, 131.

³⁶ Komorek (n 7) 406.

³⁷ *Informationsverein Lentia v Austria* (1994) 17 EHRR 93.

³⁸ *Demuth v Switzerland* (2004) 38 EHRR 20.

³⁹ Krebbers (n 13) 167.

⁴⁰ See in particular Rachael Craufurd Smith, 'Media convergence and the regulation of audiovisual content: is the European Community's Audiovisual Media Services Directive fit for purpose?' [2007] CLP 238; Miri Burri-Nenova, 'The new audiovisual media services directive: televisions without frontiers, television without cultural diversity' (2007) 44 CML Rev 1689; Caroline Pauwels & Karen Donders, 'From television without frontiers to the digital big bang:

was therefore not surprising that the Standing Committee on Transfrontier Television drafted a second amending protocol to the Convention. From the Council's perspective, this was part of a wider agenda for media and Internet regulation. At the first of a new series of conferences in Reykjavik in 2009, ministers responsible for media and new communication services referred to the protocol as 'a welcome Council of Europe response to the diversification of communication platforms and information services', which should be completed at the earliest opportunity. The ministers also noted that it should be followed by the exploration of broader legal issues regarding media-like content, Internet traffic and access to critical infrastructure.⁴¹ However, just as the draft second amending protocol was completed and on the verge of entering the final stages of discussion and approval prior to opening for signature, an objection from the European Commission put the process on hold. This objection ultimately led to the abandonment of the protocol, and calls into question the future relevance of the Convention as a whole.

The nature of the dispute between the Commission and the Council of Europe can be seen in Commission letters and the minutes of Council of Europe meetings in the period 2009/10. The key letter is that of 23 October 2009, from the Commission to the EU member states, including reference to the ultimate sanction of proceedings under then-Article 226 (now article 258 TFEU).⁴² The core argument of the letter is set out in the following paragraph.

The matters covered by the Convention fall to a great extent under Community competence since the Convention deals broadly with matters covered by the [Directive]. Therefore, in accordance with the case law of the European Court of Justice, Member States may not conclude alone international agreements which cover matters falling under Community competence.

The Commission's argument that states 'may not conclude alone international agreements which cover matters falling under Community competence' appears to classify the issue as one of 'implied exclusive external competence' rather than 'implied external competence simpliciter',⁴³ although there is some doubt as to whether this distinction is relevant after the Lisbon Treaty.⁴⁴ It should be emphasised that this is a debate over the ability of a state to sign and ratify an international agreement *in terms of EU law* rather

the EU's continuous efforts to create a future-proof internal media market' in Robin Mansell and Marc Raboy (eds), *Handbook of Global Media and Communication Policy* (Blackwell 2011).

⁴¹ Political declaration (MCM(2009)011) [6].

⁴² This letter has not been published, but was obtained by the author from the Commission (under Regulation 1049/2011 on access to documents) and from the Department for Culture, Media & Sport [DCMS] in the UK (under the Freedom of Information Act). The letter carries the reference D(09)1713 and is signed by Commissioner Viviane Reding.

⁴³ The distinction between the two is discussed in Christiana Panayi, 'Exploring the *Open Skies*: EC-Incompatible Treaties between Member States and Third Countries' (2006) 25 YB Eur L 315, 326.

⁴⁴ Paul Craig & Gráinne de Búrca, *EU law: text, cases & materials* (5th edn, OUP 2011) 81-2.

than international law.⁴⁵ The Commission suggests at the opening of the letter that there may be a conflict between the two instruments. It argued (elsewhere) that the letter was no more than a restatement of current law.⁴⁶ Indeed, the law after *Open Skies* is well summarised by Klabbers in his monograph on treaty conflict and the EU: 'if the Community has taken measures internally, the member states are pre-empted from taking external measures which may affect those internal measures or distort their scope'.⁴⁷ The Commission cites the reference in the *Open Skies* decision⁴⁸ to disconnection clauses not disturbing the principle that states cannot act alone.

This letter appears to have caused some concern for EU member states. Austria raised the matter at the Council of the EU (the Council of Ministers) in 2009.⁴⁹ Its statement criticised the Commission for raising the issue now when it had not made similar objections to the 1998 amendments to the Convention which followed the 1997 amendments to the Directive,⁵⁰ although the findings of the Court of Justice in *Open Skies* came after the first set of amendments had been agreed. Austria also asked for more information on the extent of the conflict between the instruments. At the Contact Committee (established under the Directive to consider its implementation) some states also criticised the Commission for raising its objection at such a late stage. However, the Commission denied that the objection was unexpected and emphasised that the problem was one of principle regarding the external powers of the Union.⁵¹

However, the most vehement criticism of the objection came, unsurprisingly, from within the Council of Europe itself. The significance of this problem can be best understood through summarising the responses of various bodies within the Council. This period begins with the decision of the Committee of Ministers to decline to refer the proposed revisions to the Parliamentary Assembly for comment.⁵² This had been its intention before the intervention of the Commission. Relevant comments and responses include the following:

- The secretariat (Media & Information Society Division) wrote to delegates to pass on the news and to state that it was 'very

⁴⁵ Robert Schütze, 'Federalism and foreign affairs: mixity as an (inter)national phenomenon' in Christophe Hillion & Panos Koutrakos, *Mixed agreements revisited* (Hart 2010) 77.

⁴⁶ As reported by Sion Simon (Parliamentary Under-Secretary of State for Culture, Media and Sport) in his Written Statement on the November 2009 meeting of the Education, Youth and Culture Council. HC Deb 26 November 2009, vol 501 col 88WS.

⁴⁷ Klabbers (n 26) 187.

⁴⁸ *Open Skies* (n 22).

⁴⁹ Council of the European Union, document 15814/09, <http://register.consilium.europa.eu/pdf/en/09/st15/st15814.en09.pdf>; Austria's request, forwarded to all members in advance of the meeting, was supported by other states including the Czech Republic, Estonia, Germany, Hungary, Latvia, and Romania.

⁵⁰ Indeed, as recorded in 2006, one state (Luxembourg) was told by the Commission that accession to the Convention was possible, on the grounds that it contained a disconnection clause: Tarlach McGonagle, 'Report' in Susanne Nikoltchev (ed), *Audiovisual Media Services without frontiers - implementing the rules* (European Audiovisual Observatory, 2006) 48-9.

⁵¹ Minutes of the 31st meeting of the Contact Committee established by the Television Without Frontiers Directive (3 November 2009), DOC CC TVSF (2009)6, 3.

⁵² 1069th meeting of the Council of Ministers, 4 November 2009.

- disappointed by this unexpected development' (November 2009).⁵³
- The CDMC,⁵⁴ which is the committee most engaged in debates on broadcasting, referred to its 'deep concern about the interruption of the process towards adoption of the amending protocol' (June 2010).⁵⁵
 - The CDMC Bureau recorded its 'regret' at the Commission's actions (May 2010).⁵⁶
 - The Standing Committee on Transfrontier Television, responsible for drafting the protocol, expressed its 'deep regret' at the obstacles to concluding its work, adding that it 'deplored' the failure of the Commission to raise its objections at an earlier stage (July 2010).⁵⁷
 - Adopting a harder tone than its earlier statement, the CDMC, while reiterating its concern and calling for progress to be made, added a warning of a possible 'legal vacuum' leading to 'undesirable consequences' if the Convention could not be updated as planned (November 2010).⁵⁸
 - The CDMC Bureau argued that the failure to update the Convention meant that the regulation of broadcasting in accordance with Article 10 ECHR could become difficult (October 2010)⁵⁹ (the extent to which this is the case is discussed in a later section of this paper).
 - Questions put to the Parliamentary Assembly of the Council of Europe (PACE) by Andrew McIntosh (author of the PACE report on 'The regulation of audiovisual media services' in 2008) and, after his death, by Markku Laukkanen, criticising the pause in the revision of the Convention, and highlighting the existence of conflicts between the amended Directive and unamended Convention (March 2010, December 2010, June 2011).⁶⁰

This survey demonstrates the anxiety in the Council about the way the matter was handled, but it also discloses an important legal issue about the consequences of failing to revise. However, there was to be no revised Convention. The end of the debate can be found in two subsequent documents: a letter from the Commission to the Council and a statement by the Council itself.

⁵³ Email from Secretariat to members of the Standing Committee on Transfrontier Television, 6 November 2009 (received from DCMS via FOI).

⁵⁴ Originally the CDMM (Steering Committee on the Mass Media), it was at the time of these events known as the CDMC (Steering Committee on the media and new communication services). Since January 2012, it has been known as the CDMS (Steering Committee on Media and Information Society).

⁵⁵ Report of the 12th meeting of the CDMC, 8-11 June 2010.

⁵⁶ Report of the meeting of the Bureau of the CDMC, 6-7 May 2010, CDMC-BU(2010)002, 8.

⁵⁷ 45th meeting of the Standing Committee on Transfrontier Television, 1-2 July 2010, T-TT(2010)2, 2.

⁵⁸ Report of the 13th meeting of the CDMC, 16-19 November 2010.

⁵⁹ Report of the meeting of the Bureau of the CDMC, 14-15 October 2010, CDMC-BU(2010)004, 9.

⁶⁰ Written question 584 to the Committee of Ministers, 10 March 2010, document 12182; Written question 591 to the Committee of Ministers, 15 December 2010, document 12452 (but note that the Committee did discuss the McIntosh question on 31 March 2010, as the information disclosed by DCMS confirms); CM/AS(2011)Quest591 final, adopted at the 1116th meeting of the Ministers' Deputies of the Committee of Ministers, CM/Del/Dec(2011)1116, 15-16 June 2011.

The letter, dated 10 December 2010, responds to a request from the Council for an explanation of the October 2009 letter.⁶¹ Commissioner Kroes, who had in the meantime taken over from Reding as the Commissioner responsible for media, broadly restates the arguments of the 2009 letter, but with some additions. For example, Article 3(2) TFEU,⁶² which was not in force when the 2009 letter was sent, is cited. One of the consequences of the delay resulting from the second letter is the strengthening of the Commission's case, in so far as it is founded on the TFEU. Furthermore, the formal position is stated in stronger terms and disconnected from the narrower argument on the text of the instruments: 'for those matters [covered by the Convention], the Union thus has acquired exclusive competence to enter into international agreements. As a consequence, even if the substance of the Convention would not conflict with Union law – which is not the case here – EU Member States may not become party to the Convention on their own'.

Most importantly, the Commission records its firm position regarding the relationship between the two documents, and its future intentions, in the following paragraph.

As the [EU Ambassador] already explained to the Committee of Ministers [of the Council of Europe], the EU does not intend to become a party to the Convention, as this would constrain the speed and scope of any future policy response in the areas covered. Furthermore, the Union's audiovisual acquis is already relevant to almost all Parties to the Convention given that the Union has legal relations with almost all Convention Signatories, which ensures or will ensure the application of the acquis. The added value to the EU of such a convention in terms of the wider geographical scope would therefore be rather limited.

Having established that states cannot ratify the amended Convention without the agreement of the EU, the Commission now makes it clear that it has no intention of offering such agreement. Such agreement, according to the Commission, would restrict EU flexibility regarding future changes; the 'added value' of the Convention is limited, as almost all signatories are subject to the Directive whether through EU membership or other legal agreements. The

⁶¹ This letter has also not been published, but was obtained by the author from the Commission (also under the Regulation on access to documents). The letter carries the reference KROES/2010/A/1341 and is signed by Commissioner Neelie Kroes.

⁶² 'The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope'; see also article 216 TFEU: 'The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope'. It has been suggested that these texts, as well as codifying the decisions of the ECJ, slightly extend the exclusive powers of the Union regarding international agreements: Jan Wouters, Dominic Coppens & Bart de Meester, 'External relations after the Lisbon Treaty' in Stefan Griller & Jacques Ziller (eds), *The Lisbon Treaty: EU constitutionalism without a constitutional treaty?* (Springer 2008) 179-180.

letter refers to the 'audiovisual acquis', which could suggest that the Commission means to include other instruments as well as the Directive. Furthermore, the reference to legal relations which 'ensure or will ensure' its application may refer to future enlargement.

Although not included in this letter, the reference to added value may also reflect the 2006 view of the Commission that such value would be found in scope rather than geography.⁶³ Doubting the value of the Council's role and arguing that the EU can deal with the geographical issue goes back even further, though.⁶⁴ The reasons for the objection were also put forward by the representative of the Commission at a meeting of the Standing Committee on Transfrontier Television in July 2010, which added details such as that the Commission intended to extend the application of the Directive in non-EU states through stability and association agreements.⁶⁵ This might appear to go against the conventional reasoning in favour of Council of Europe conventions in being preferable to bilateral agreements as they encourage co-operation in sensitive areas and point towards greater cohesion,⁶⁶ although the agreements, in the context of the neighbourhood policy, may not be truly bilateral but more the extension of Union-led asymmetric multilateralism.

With this in mind, the only thing left for the Council to do was to recognise the new position and decide what to do about the Convention. This was brought about in the first months of 2011, when the Standing Committee on Transfrontier Television noted the decision of the Committee of Ministers of the Council of Europe to 'discontinue work on transfrontier television'.⁶⁷ The Committee's Bureau also responded to these events, noting 'disquiet' at the decision to discontinue and referred to the 'current legal uncertainty' resulting from there being different rules in the two instruments.⁶⁸ This is a reference to the Directive having been updated and now fully in force and (mostly) transposed, while the Convention is still as it was in 1998.

⁶³ Karol Jakubowicz, 'Implementing and monitoring: upholding human rights and cultural values' in Susanne Nikoltchev (ed), *Audiovisual Media Services without frontiers - implementing the rules* (European Audiovisual Observatory 2006) 41. Note that Jakubowicz was then the chair of the CDMC.

⁶⁴ See for example the report on the 11th Congress of the International Federation for European Law (FIDE) in 1985, where the representatives of the Commission 'pointed out that the activities in the framework of the CoE were useful but could not serve as a substitute for Community action in the field of radio and TV. The Recommendations and Resolutions of the Council of Europe have no binding force. In addition, the existing Recommendations do not cover all aspects [...] close co-operation with those European countries which do not belong to the Community is, of course, desirable and can be easily established' (reproduced in Seidel (n 35) 134).

⁶⁵ 45th meeting of the Standing Committee on Transfrontier Television, 1-2 July 2010, T-TT(2010)2, 1-2. The ratification of the Convention is frequently pointed to when progress towards EU law in the field of media is being assessed: see for example the Opinions on the application for membership by Montenegro (SEC(2010) 1334) and Croatia (COM(2004) 257), the Neighbourhood Policy progress reports on Azerbaijan (SEC(2010) 519) and Georgia (SEC(2010) 518), and the discussion of Serbia in the Enlargement Strategy (COM(2009) 533).

⁶⁶ Benoit-Rohmer and Klebes (n 3) 85.

⁶⁷ Note dated 4 February 2011 published on the T-TT website, http://www.coe.int/t/dghl/standardsetting/media/T-TT/default_en.asp.

⁶⁸ Report of the meeting of the Bureau of the CDMC, 9-11 May 2011, CDMC-BU(2011)002, 3.

Given that one of the purposes of the revision to the Directive was to clarify its scope for non-linear services, this is not an insignificant point. However, in practice, the unamended Convention may itself be limited in its force, as of the non-EU states that are party to the Convention, a majority are candidate states (e.g. Macedonia) or wish to join the Union in due course (e.g. Albania), and may be the subject of bilateral or informal arrangements with the Union in the interim, such as those discussed above. An exception may be Ukraine, as the only 'large' state party to the Convention without a current or likely link with the EU. It can therefore be concluded that the Council's role in relation to the matters included in the Convention is marginal at best, and the EU faces little challenge in leading the debate on the next steps in broadcast regulation. In the next section, the reasons for this conclusion are further explored, and the trajectory of cooperation and competition between the Union and Council explained.

4. Analysis 1: the European Commission

It is notable that although many parties are critical of the timing and tone of the Commission intervention, few if any present an alternative view of the legal question of competence. In this regard the question of broadcasting has come to resemble other areas of activity where the EU's role has become a *fait accompli*.⁶⁹ Reflecting on the ending of bilateral air agreements, Bartlik pointed out that because air transportation is now regulated within the EU by the (then-)Community, 'it is therefore only about time that this reality is also recognised on the international stage and that the Community is attributed a corresponding significance and possibility of participation'.⁷⁰ Another scholar describes the series of decisions by the ECJ as a trend towards 'shared competences' for external affairs.⁷¹ The Commission's successful intervention regarding the Convention can be seen as a claim for recognition, significance and participation along these lines. Indeed, a statement that international law is being Europeanised as a result of a 'triangular relationship' between international, EU and national law⁷² does describe the tension very well, albeit with the end result leaving some doubt on whether international law (through the Council of Europe) will have any role at all. On the other hand, there are situations where the dispute between the Commission and member states (through the Council) is more closely balanced; the Commission has commenced legal action against the Council, arguing against the Council's shared-competence approach to a proposed Council of Europe instrument on intellectual property rights in broadcast signals,⁷³ as it has regarding conditional access (discussed below).

⁶⁹ But more generally, the role of international agreements remains difficult and frequently litigated: Editorial, 'The Union, the Member States and international agreements' (2011) 48 CML Rev 1.

⁷⁰ Martin Bartlik, *The impact of EU law on the regulation of international air transportation* (Ashgate 2007) 42.

⁷¹ Christiaan Timmermans, 'Evolution of mixity since the Leiden 1982 conference' in Christophe Hillion & Panos Koutrakos, *Mixed agreements revisited* (Hart 2010) 2-3.

⁷² Jan Wouters, André Nollkaemper & Erika de Wet, 'Introduction' in Jan Wouters, André Nollkaemper & Erika de Wet (eds), *The Europeanisation of international law* (Asser 2008).

⁷³ Case C-114/12 *Commission v Council*. The case has not yet been heard.

de Witte has pointed to how EU member states cannot conclude treaties in areas such as trade in goods, adding that the ill-defined ability of the EU to act without the separate approval of the member states when a given agreement is 'closely related to a previously adopted internal act' is problematic.⁷⁴ The situation of broadcasting is slightly different. The EU is making a claim regarding external powers but then proposing not to use them and to prevent them from being used by anyone else. Neither is this truly a conflict between a prior obligation of a member state and a subsequent obligation of Union membership,⁷⁵ as the dispute arises out of an attempt to amend an existing instrument (i.e. a proposed new obligation).⁷⁶ Finally, for the EU to ratify a convention on broadcasting in its own right, article 207(6) TFEU could well require internal unanimity. This Treaty provision requires unanimity (as a departure from the general approach to external agreements and the common commercial policy) 'in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity'. In the light of the difficult adoption and revision of the Directive itself, this may surely not be secured without effort.

In the case of the Convention and the Directive, it was observed that the 'tendency among regulators to accord to some of the provisions of the Convention the meaning of their counterpart in the Directive, and vice versa, may have helped to avoid conflicts'⁷⁷ between the two instruments.⁷⁸ The disconnection clause acknowledges the possibility of divergence and ensures, with the Union, that the Directive prevails.⁷⁹ There have been some cases where the distance between the two instruments has in fact been emphasised. In *Commission v UK*, the UK had argued it would be 'absurd' to depart from the Convention (regarding jurisdiction), but the Commission contended that the Directive and Convention pursued different aims – internal market and facilitating transfrontier television respectively.⁸⁰ The court

⁷⁴ Erika de Witte, 'The emergence of a European system of public international law: the EU and its member states as strange subjects' in Jan Wouters, André Nollkaemper & Erika de Witte (eds), *The Europeanisation of international law* (Asser 2008) 41

⁷⁵ Reflecting the principle of *pacta sunt servanda*; in the context of EU law, see Case 812/79 *AG v Burgoa* [1980] ECR 2787, as discussed in Julie Grimes, 'Conflicts between EC law and international treaty obligations: a case study of the German telecommunications dispute' (1994) 35 *Harvard J Intl L* 535; see also Klabbers (n 26) 127-8.

⁷⁶ A revision of a treaty will normally be treated as a new treaty, meaning that the provision will not be applicable: see Case 34/79 *R v Henn & Darby* [1979] ECR 3795; *Open Skies* (n 22) [25]-[29].

⁷⁷ Goerens (n 13) 3.

⁷⁸ Case C-89/04 *Mediakabel* [2005] ECR I-4891 [41] (on the definition of television in the context of near-video-on-demand); Case C-245/01 *RTL* [2003] ECR I-12489 [63] (advertising during films); Case C-11/95 *Commission v Belgium* [1996] ECR I-4115 [24] (on the inclusion of cable transmission within the scope of the Directive). Furthermore, see the Opinion of AG Jacobs in Case C-34/95 *De Agostini* [1997] ECR I-3843 [74], finding that the specific reference to consumer protection and advertising in the Convention but not in the Directive is a recognition of the lack of separate legal provision for advertising in the Council (but not the EU) rather than a deliberate exclusion of this matter from the Directive.

⁷⁹ *Cremona* (n 27) 176.

⁸⁰ Case C-222/94 *Commission v UK* [1996] ECR I-4025 [43-50]. See also AG Jacobs in Case C-34/95 *De Agostini* [1997] ECR I-3843 [46] on article 16 of the Convention for another example of deliberate difference, again explained by reference to the internal market.

adopted the Commission's view and noted that the Directive was, on this point, deliberately different to the Convention.⁸¹ On the other hand, the most recent broadcasting decision of the Court of Justice (on incitement to hatred) includes an important reference to the Convention in the Opinion of AG Bot.⁸² This recent decision, in the tradition of the human rights influence discussed in section 2 (above), is a further example of beneficial deliberative competition in the field of broadcasting.

However, it remains possible for the EU to accede to Council of Europe treaties (although this is still relatively rare),⁸³ and Council of Europe conventions have continued to influence EU law in areas such as data protection and terrorism.⁸⁴ Perhaps as a partial explanation, it can be noted that data protection and terrorism are matters where the competence of the Union was established closer to the present day or remains the subject of debate. However, this is not an entirely satisfactory explanation for the special status of broadcasting. Data protection saw both diverging practice across EU member states before adoption of a directive in 1995⁸⁵ (initially on the basis of internal market harmonisation rather than fundamental rights), and the adoption of an early (1981) Council of Europe instrument.⁸⁶ These features might suggest a similarly strong role for the Council of Europe. The difference is that, in the case of data protection, the Commission is participating ('on behalf of the EU') in the revision of the Council of Europe convention,⁸⁷ as a follow-up step to its publication of a proposed Regulation on data protection.⁸⁸ A clue comes from the final sentence of the Commission statement on this matter; 'the negotiation is an opportunity to export the EU's gold standard of data protection beyond the borders of the Member States.'

Indeed, this approach of seeing the Council of Europe as a vehicle for the extension of the application of EU law⁸⁹ can also be observed in cases where the Council of Europe has not yet adopted an instrument. In particular, the EU

⁸¹ It should be noted that the Convention was subsequently amended and this particular conflict no longer exists.

⁸² Joined Cases C-244/10 *Mesopotamia Broadcast* and C-245/10 *Roj TV* [2012] 1 CMLR 32 [74], where, interpreting article 22a of the Directive (now article 6) on incitement to hatred, he refers to article 7 of the Convention ('racial hatred') and its explanatory report; the latter in turn refers to a Council of Europe recommendation (R(97) 20) which gives a broad definition of hate speech.

⁸³ Benoit-Rohmer & Klebes listed nine: (n 3) 129.

⁸⁴ Ibid 130.

⁸⁵ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

⁸⁶ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS 108 (1981).

⁸⁷ European Commission, 'Commission to renegotiate Council of Europe Data Protection Convention on behalf of EU' MEMO/12/877 (19 November 2012).

⁸⁸ European Commission, 'Proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data' COM(2012) 11.

⁸⁹ On the many ways in which the EU can achieve its goals through international organisations, see Bruno de Witte, 'The European Union's domestic affairs' in Enzo Cannizzaro, Paulo Palchetti and Ramses Wessel, *International law as law of the European Union* (Martinus Nijhoff 2012) 151-4.

has been seen to ask the Council of Europe to prepare conventions in areas that have already been the subject of a directive. An example is the regulation of information society services, where the provisions of the Electronic Commerce Directive⁹⁰ are supported by a subsequent Council of Europe Convention.⁹¹

In an area closely related to broadcasting, a further type of Union-Council interaction can be observed. This is the Conditional Access Convention,⁹² which is itself based on the Conditional Access Directive.⁹³ Like the Transfrontier Television Convention and the Audiovisual Media Service Directive, the language of the two conditional access instruments is closely aligned, although in this case the directive came a number of years before the corresponding convention. The Conditional Access Convention also contains a disconnection clause in the exact same terms as the ECTT. Instead of frustrating its continued operation, though, the Commission recommended⁹⁴ that the EU itself sign the Conditional Access Convention, using Article 207(4) TFEU on international agreements within the scope of the common commercial policy. The Council of the EU agreed that the Union should sign the convention, but on the basis of articles 114 (internal market) and 218(5) (international agreements in general) TFEU.⁹⁵ The Commission has taken legal action against the Council of the EU's decision and in support of its original recommendation.⁹⁶ In this situation, there is agreement that the Council of Europe instrument should continue to function, but with a dispute about the correct legal basis. Regarding broadcasting, the dispute on legal basis is supplemented by division within the Council of the EU, and above all by the Commission's view that the Council of Europe has no role to play.

So, how does this dispute regarding broadcasting sit within wider issues of Council-Union relations? To answer this question, we can turn to a distinction (made by Brosig in a general review of relations between the Council, the Union, and the OSCE) between (a) cooperation, (b) division of labour and (c) competition.⁹⁷ This section classifies the approach to broadcasting over time,

⁹⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.

⁹¹ Convention on Information and Legal Co-operation concerning "Information Society Services", ETS 180 (2001). The Convention is focused on the sharing of information regarding national regulations in this field.

⁹² European Convention on the Legal Protection of Services based on, or consisting of, Conditional Access, ETS 178 (2001).

⁹³ Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access [1998] OJ L320/54.

⁹⁴ European Commission, 'Proposal for a Council Decision concerning the signing of the European Convention on the legal protection of services based on, or consisting of, conditional access' COM(2010) 753.

⁹⁵ Council Decision of 29 November 2011 on the signing, on behalf of the Union, of the European Convention on the legal protection of services based on, or consisting of, conditional access [2011] OJ L336.

⁹⁶ Case C-137/12 *Commission v Council* [2012] OJ C151. The case has not yet been heard.

⁹⁷ Malte Brosig, 'Governance between international institutions: analysing interaction modes between the EU, the Council of Europe and the OSCE' in David Galbreath and Carmen

using Brosig's high-level categories. Brosig's analysis was addressed to a general audience and did not include a discussion of the subject of broadcasting, but using his analysis contributes to the goal of this article of understanding the institutional context for the dispute as well as the issues unique to broadcasting.

*Cooperation*⁹⁸

It is not difficult to conclude that the regulation of the media has been, for a significant period of time, a core field for the Council of Europe, particularly if we understand it as a sub-field of freedom of expression, as the Council often does. Other reflections on the media, such as the relationship between the media and democracy, also favour this interpretation. Moreover, given the absence of substantial EU intervention in the field of broadcasting until after the Single European Act, and the ongoing absence of a clearly defined EU role as regards the press, pluralism and indeed the 'mix' of funding models in member states,⁹⁹ broadcasting could have been considered as relatively peripheral for the Union at some stage in the past. This was in the context where the EEC was happy to focus on economic integration while 'cultural issues would be left to other international organizations with an explicitly cultural remit, notably UNESCO and the Council of Europe',¹⁰⁰ with the EEC beginning to play a role that was complementary and subsidiary.¹⁰¹

*Division of labour*¹⁰²

This describes accurately the state of relations during the lifetime of the Convention and Directive. After the compromises of the late 1980s, both institutions continued to pay attention to the media and the 1997/98 amendments were made without inordinate delay or difficulty. Links between the two demonstrate some attempts to allow the work of one to inform the other (e.g. in the case of developing problems in advertising),¹⁰³ and the parallel dialogue between the institutions on the question of media pluralism similarly suggests that both bodies shared the topic of media in this fashion. There were opportunities for EU member states to consider media matters without the limitations of EU competence.¹⁰⁴ Finally, the suggestions

Gebhard (eds), *Cooperation or conflict?: problematizing organizational overlap in Europe* (Ashgate 2010) 37.

⁹⁸ 'when institutions overlap outside their core fields of competence or if they at least overlap in a peripheral area in one organisation and a core area in another'

⁹⁹ See discussion of different Western European models of the media such as liberal and democratic corporatist in Daniel Hallin & Paulo Mancini, *Comparing media systems: three models of media and politics* (CUP 2004).

¹⁰⁰ Rachael Craufurd Smith, 'Introduction' in Rachael Craufurd Smith (ed), *Culture and European Union law* (OUP 2004) 2.

¹⁰¹ Joseph McMahon, 'Preserving and promoting differences? The external dimension of cultural cooperation' in Rachael Craufurd Smith (ed), *Culture and European Union law* (OUP 2004) 328.

¹⁰² 'if international institutions overlap in their core competence fields'

¹⁰³ European Commission, 'Interpretative communication on certain aspects of the provisions on televised advertising in the "Television without frontiers" Directive' [2004] OJ C102/02.

¹⁰⁴ Richard Collins, *From satellite to single market: new communication technology and European public service television* (Routledge 1998) 235.

emanating from the Commission regarding the future of the Convention (as discussed above) might suggest a way to understand the current position as a division of labour, were it not for the wider rivalry discussed under the next heading.

*Competition between organisations*¹⁰⁵

This may be the most appropriate description of the current relationship between the Council and the Union regarding the media. While it is presently difficult to describe the Council's role as peripheral (because even if the Convention is put to one side, there is a large body of work underway on other media topics), the first concept of 'significant overlap' has been demonstrated by the exchanges between the Commission and the Council discussed in this article. In particular, the difficulty experienced by various parties in articulating the areas that are not within the competences of the Union illustrates the value of considering the media (or perhaps broadcasting) as the field rather than a subset of media issues. Furthermore, it is hard to argue with the characterisation of the law on services (in respect of the Union) and on freedom of expression (in respect of the Council) as core competence fields of each respectively. With it being difficult to work on one without a demonstrable impact on the other, Brosig's third category sums up the problems of European broadcasting regulation at this point in time. Beneficial deliberative competition has been damaged by the events of the past five years.

5. Analysis 2: the response in the UK

In this section, the reaction of one state (the UK) to the revision process is scrutinised, so as to verify and extend the analysis in section 4 (above) on the relations between the European institutions, and to highlight how states handle the tensions between their desired policy objectives and their reading of legal powers. It will be shown how the tactical use of the Council for substantive reasons in the 1980s has been replaced by the tactical abandonment of the forum for other substantive reasons in more recent debates.

The UK was, as has been noted, an early supporter of the Convention. Even after both instruments were adopted, it continued to favour the Convention, including the use of its text in preference to that of the Directive.¹⁰⁶ It was an active party during the negotiation of the amending protocol, and raised concerns in relation to a number of clauses (articles 29 and 33). The first was resolved to the apparent satisfaction of the UK, but the second was the subject of sustained criticism voiced by the UK through various channels. The problem with article 29 (which deals with the reception of on-demand services) appeared to be the attempt of the Secretariat to draft the Convention clause with more explicit ECHR language than before. As compared with the

¹⁰⁵ 'if there is significant overlap in core competence fields or if one core area of one organisation threatens to dominate a peripheral policy area of another organisation'

¹⁰⁶ Frere Cholmeley Bischoff, *Audio and audio-visual industries in the European Community: recent developments* (Frere Cholmeley Bischoff, 1993) 5.

text taken from the Directive, one proposal would have referred to the limitations of article 10 ECHR without more, while another would have used much of the text of article 10(2). Correspondence between the Department for Culture, Media & Sports ['DCMS'] and the Ministry of Justice highlights the UK's fear that this language might *narrow* the scope for State derogation from the general principle of freedom of reception, pointing out that under international law, there is no general objection to blocking the reception of on-demand services.¹⁰⁷ Separately, the UK responded to the McIntosh report on this point,¹⁰⁸ disagreeing with McIntosh's objection to the *wider* scope for restriction under article 29 on the grounds that it would be difficult to apply different tests if the Convention and Directive were not aligned.¹⁰⁹ Ultimately, the language adopted for article 29 was as originally proposed (i.e. in line with the Directive), although the record is not clear on how this decision was reached. It is interesting to note that the objection here (that the Convention might prevent states from blocking objectionable content) is at cross-purposes to the defence of the country of origin principle that characterises the approach of the UK to the harmonisation of broadcasting law, including its concerns regarding article 33 of the Convention, to which I now turn.

The objection of the UK to article 33 was that it would, as the DCMS told MPs mean the 'effective jettisoning of the country of origin principle'.¹¹⁰ Article 33 of the draft Convention is based on article 4 of the revised Directive, which established (in the light of Court of Justice decisions)¹¹¹ a new procedure that offers some scope to 'receiving' states to take action against broadcasters. This procedure applies to television broadcasting, where a broadcast under the jurisdiction of one state is 'wholly or mostly directed' at the territory of another, and where the latter (receiving) state has adopted 'rules of general public interest' beyond the Directive.

The UK argued that the language was appropriate in the case of the Directive, where it acted in a context of strong dispute resolution and enforcement powers held by the Commission and a substantial body of relevant law.¹¹² It was not so in the case of the Convention, where the Standing Committee

¹⁰⁷ Email from DCMS to Ministry of Justice, 16 February 2009 (FOI). This is a much more complicated issue, though, recalling the lengthy debates on direct broadcasting by satellite (DBS) and, more recently, the role of the WTO (e.g. the US/China dispute on print and audiovisual media imports).

¹⁰⁸ Discussed above in the section on Council of Europe responses: n 60.

¹⁰⁹ A document (which appears to a briefing note for MPs according to the filename but is otherwise unidentified), approximately January 2009 (FOI).

¹¹⁰ Internal email, DCMS, 25 September 2009 (FOI).

¹¹¹ E.g. Case C-148/91 *Veronica* [1993] ECR I-487.

¹¹² Examples here are the principle that member states cannot take unilateral action against broadcasters licensed in another state on the grounds that the other state has not transposed the Directive correctly (Case C-14/96 *Denuit* [1997] ECR I-2785), the treatment of attempts to circumvent national rules (Case C-23/93 *TV10 v Commissariaat voor der Media* [1994] ECR I-4795) and the procedure by which a service that would harm minors can be restricted (e.g. *R v Secretary of State for National Heritage ex parte Continental Television* [1993] 3 CMLR 387, which was referred to the ECJ but withdrawn: Jackie Harrison & Lorna Woods, *European broadcasting law and policy* (CUP 2007) 20).

lacked the necessary powers.¹¹³ DCMS raised this issue in direct correspondence with the Satellite and Cable Broadcasters Group (SCBG)¹¹⁴ and the consultation document on the revision of the Convention described the issue in sceptical detail.¹¹⁵ At the meeting of the Standing Committee on Transfrontier Television where discussion of the revisions was completed, the UK agreed with all clauses apart from this one.¹¹⁶ This is an interesting demonstration of the difficulties with parallel texts, as while the partial abrogation of country of origin in the 2007 amendments to the Directive could be tolerated by its supporters (because the abrogation was in turn constrained by the institutional and legal role of the Commission and Court of Justice), the same text proved difficult in the Council of Europe, which does not have the same mechanisms to limit member state action. It is therefore not the text that causes the problem, but how it operates within a given institutional context.

With this in mind, the overall attitude of the UK to the Convention can be scrutinised. It appears that the UK accepted, on legal advice, the view of the Commission regarding the external powers of the Union.¹¹⁷ Nonetheless, the action of the Commission in raising the issue at a late stage was variously described as 'curious'¹¹⁸ and 'surprising'.¹¹⁹ However, this was to be to the advantage of the UK. In the light of its objections to the content of the proposed revision, it did not object to the revision process coming to an end¹²⁰ and the Commission intervention was therefore 'not unwelcome'.¹²¹ This is particularly significant as, before this intervention, there is no sign that the UK had confirmed its view on whether to ratify the Convention or not, but it did appear to recognise its marginal position regarding article 33, with other supporters of country of origin not seeing a problem with the text.¹²² Indeed, a DCMS document written after the final decision of the Transfrontier Television committee but before the Reding letter focuses on the need to make a decision on ratification after consultation with stakeholders, without even alluding to any issue of competence.¹²³ The new vigour with which the Commission pursued its objection to the Council of Europe's role therefore proved to be of unexpected assistance to the UK in resisting an unwelcome clause, and the Convention was left without one of its most vocal advocates.

¹¹³ Letter from DCMS to UKDEL (UK Delegation to the Council of Europe), 20 January 2009 (FOI). The letter also confirmed that the UK did not have this objection regarding article 29.

¹¹⁴ Email from DCMS to SCBG, 16 February 2009 (FOI).

¹¹⁵ 'Council of Europe Transfrontier Television Convention Preliminary Consultation' (September 2008), 11.

¹¹⁶ Internal email, DCMS, 18 June 2009 (FOI).

¹¹⁷ This is difficult to determine, due to redactions under sections 27 and 42 of the FOI Act, but one DCMS internal memorandum contains the unambiguous (and unusually unredacted) statement that 'legal advice is that (Reding) is right about the EU exclusive competence': 30 November 2009 (FOI).

¹¹⁸ *Ibid.*

¹¹⁹ 'Points to make at Committee of Ministers' (undated, but approximately March 2010) (FOI).

¹²⁰ *Ibid.*

¹²¹ DCMS memorandum, 30 November 2009 (FOI).

¹²² 'Points to make' memorandum (n 119).

¹²³ Internal email, DCMS, 18 June 2009 (FOI).

6. Conclusion: where next for the Council of Europe?

The purpose of this article was to establish why the disagreement between the institutions came about, and the implications of that disagreement. A number of answers to the first question have been proposed: the additional powers of the Union under the Lisbon Treaty, the lack of EU member state support for the Convention, and the lack of 'value' of the Convention to the EU. One cannot help thinking that the issue has not been handled well – a full revision brought to the brink of adoption, and a range of legal and political issues presented at the last minute. It has been suggested that the timing of the entry into force of Lisbon was relevant, as was the unusual tactical approach of the UK.

In order to answer the second question, a number of possible 'next steps' are now considered, drawing upon the detailed analysis of recent events set out above. These options are (a) EU ratification of the Convention and (b) the drafting of a new media instrument by the Council.

It has been demonstrated that a significant 'roadblock' to the updating of the Convention has been reached. It would be simple to conclude, on the basis of the analysis in part 4 in particular, that the solution would be for the EU to negotiate and ratify the Convention. However, although compelling in some fields, it is hard to see it being a realistic one as regards broadcasting. As argued above, the EU continues to support comparable instruments like the Conditional Access Convention. In such cases, it sees the Council as a useful way to promote its already-agreed policies and legislative texts. Wider adoption of the provisions on conditional access would be in the interests of the Union (as an anti-infringement measure which could reduce troubling imports from non-Union states), particularly where the text remains closely aligned. The same would be the case for data protection, where one of the key achievements of the existing directive is to project EU standards beyond EU borders.

Cultural concerns in relation to the regulation of media content may be much more pressing than what would seem to some a more technical issue of conditional access, which does not divide the 'industry' in the way that other aspects of media policy clearly do (although the proposed data protection regulation does enter riskier territory, particularly in terms of its interaction with freedom of expression). Furthermore, in the case of broadcasting, the Commission is on record (as discussed above) as opposing the Council's role on grounds such as preserving Union flexibility in terms of future amendments. Why, then, would it validate the very role it disavows? It is also clear that the Council is not going to pursue the point in the face of the exclusive-external case of the Commission, as compared with its more assertive approach in respect of the proposed intellectual property instrument.

As such, the second possible outcome must also be considered: for the Council to address other areas of media law and policy. There is evidence of this happening; for example, in the emerging area of internet governance, the Council is playing a visible role, preparing a set of principles and intervening

in debates such as domain name management and net neutrality. Furthermore, in the case of pluralism, it is well known that the Council has argued in favour of media pluralism over an extended period¹²⁴ (even when the EU has showed less of an ability to deal with the topic).¹²⁵

What could a future Council of Europe instrument deal with? Clues are found in the documentation relating to the abandonment of the Convention. Regarding the possible scope of such an instrument, a note to the UK government on discussion at EU level suggested that this might be an instrument dealing with 'the values of public service broadcasting, unbiased news, etc'.¹²⁶ Another statement by the Commission considered the possibility of a convention on non-EU issues or 'a convention in association with the EU to consolidate case law on article 10 of the European Convention on Human Rights in the context of audiovisual media services'.¹²⁷ The need for the latter was the subject of particular doubts expressed by members of the Standing Committee on Transfrontier Television,¹²⁸ and the chair of the CDMC (writing before the emergence of the competence issue) recorded that the option of a new convention had already been considered and rejected in 2004 among some controversy.¹²⁹ However, Komorek has observed that a Council instrument on pluralism could increase the possibility of an EU instrument being agreed in due course,¹³⁰ although the close relationship between the regulation of ownership (which would be difficult for the Council to tackle) and the principle of pluralism would be a formidable obstacle.

The possibility of a separate Council instrument on non-EU matters therefore remains alive, but even if such an instrument is agreed, how significant will it be? What of the authority of the Council in the area of media policy when it has been sidelined so unequivocally regarding the key contemporary issue of regulation of television and of on-demand services? Just as the original adoption of the Convention was influenced by the desire of the UK and other states to see broadcasting dealt with outside the EEC, its abandonment reflects the Commission's lack of interest in using the Council of Europe in the way it does in other fields. Furthermore, dispute over substantive issues lead supporters like the UK to adopt an uncharacteristic degree of deference to the primacy of the European Union. Did the Council overreach in carrying over the new provisions on receiving states, to the extent that it alienated possible supporters? The UK and the Commission pursued different goals, in the 1980s and today, but the unifying theme is the instrumental (or even opportunistic) use of the Council process by both the EU and its member states.

The revised Directive is argued to be as important as the original was,

¹²⁴ Komorek (n 7) 413.

¹²⁵ Ewa Komorek, 'European attempts to regulate media concentrations: persisting conflict of interests' (2005) 4 *Hibernian LJ* 53.

¹²⁶ Internal email, DCMS, 30 November 2009 (FOI).

¹²⁷ 45th meeting of the Standing Committee on Transfrontier Television, 1-2 July 2010, T-TT(2010)2, 2.

¹²⁸ *Ibid.*

¹²⁹ Jakubowicz (n 63) 42.

¹³⁰ Komorek (n 7) 414.

'usher(ing) in a new regulatory era'.¹³¹ Yet looking at the Council's role, including through Article 10, its wider work on cultural policy and its persuasive (albeit yet unsuccessful) attention to media pluralism, its absence from the field would be regrettable. The benefits of the Convention to the development of EU audiovisual law and policy have been outlined in this article. The 'new regulatory era' risks being a poorer, less deliberative one. The unexpected nature of the Commission's apparent change of heart also demands that attention to the long-term Union/Council relationship be considered in other fields, even if there is apparent unity of purpose for the time being.

¹³¹ Pauwels & Donders (n 40) 525.